Supreme Court, U.S.
FILED
FEB 23 2007
OFFICE OF THE CLERK

(3)

Docket No. 06-983

IN THE UNITED STATES SUPREME COURT

ROBERT J. DEBRY AND ASSOCIATES, P.C.,
a Utah corporation,

Petitioner,

vs.

QWEST DEX, INC., a Colorado corporation, and
DEX MEDIA WEST, LLC, a Delaware Limited Liability
corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Lynn P. Heward
Attorney for Petitioner
Robert J. DeBry & Associates
4252 South 700 East
Salt Lake City, UT 84107
(801) 262-8915

CORPORATE DISCLOSURE STATEMENT

Robert J. DeBry and Associates, P.C. is a nongovernmental Utah corporation. It does not have a parent corporation, nor is there any publicly held company that owns more than 10% of this corporation's stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES v

ARGUMENT 1

I. THIS COURT'S REVIEW IS NEEDED TO PRESERVE THE BALANCE BETWEEN FEDERAL AND STATE COURTS. 1

II. FEDERAL COURTS MUST NOT BLINDLY ACCEPT A STATE COURT'S FINAL DECISION IF THAT DECISION IS BASED ON THE WRONG FACTS. 2

III. IT IS NOT A FUTILE GESTURE FOR THIS COURT TO INSRUCT THE TENTH CIRCUIT TO DECIDE THIS CASE BASED ON THE ACTUAL FACTS. 3

CONCLUSION 5

TABLE OF CITED AUTHORITIES

CASES

Lehman Brothers v. Schein, 416 U.S. 386, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974) 1

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., 2006 UT 41, 144 P.3d 1079 2-4

STATUTES

§13-11a-1, et seq., *Utah Code* 3, 4

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO PRESERVE THE BALANCE BETWEEN FEDERAL AND STATE COURTS.

In its Petition for Writ of Certiorari (at 14), DeBry quoted from the case of *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974) as follows:

> It [certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.

DeBry went on to point out that courts would realize such savings if this Court would instruct federal courts on their responsibility after receiving a state court's answer to a certified question. That is, there are probably many, many other cases where state courts sidestep certified questions, answering them based on new or twisted facts.

In opposition, Dex argues that it has only been able to locate one case in which such an allegation was addressed. Opposition at 5. On this basis, Dex asserts that there is no reason for this Court to give guidance regarding this issue.

However, such a case represents only the tip of the iceberg. Dex has set forth many arguments before this Court as to why parties may feel it would be futile to ask the federal court to address the merits of a case when a state court has answered a certified question. Nevertheless, this Court needs to give guidance so that federal courts will properly discharge their responsibility.

It is important for this Court to clearly instruct federal courts to address the actual facts of the cases before them. Federal courts cannot blindly rely on state courts that have taken a shortcut and provided an answer based on facts different from those certified. By following such instruction,

federal courts can receive guidance from state courts without compromising the integrity of the federal court system.

II. FEDERAL COURTS MUST NOT BLINDLY ACCEPT A STATE COURT'S FINAL DECISION IF THAT DECISION IS BASED ON THE WRONG FACTS.

In its Petition for Writ of Certiorari (at 11-14), DeBry pointed out how the facts found in the Tenth Circuit's Order Certifying State Law Question (App. A) differed substantially from the facts used by the Utah Supreme Court in answering the certified question. See *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, 2006 UT 41, 144 P.3d 1079 (App. B).

In opposition, Dex argued that the means by which the Utah Supreme Court reached its final answer were irrelevant. That is, Dex argued that it did not matter that the reasoning was based on different facts, or that "material subsets" of the certified question were erroneous. Opposition at 7. All that mattered was that the final conclusion was what Dex had sought.

It is true that the final conclusion was what the Tenth Circuit followed. However, federal courts must not be blind or cavalier in accepting the bottom-line conclusion reached by a state court.

Rather, the federal court must glean the pronouncements of state law from the state court's opinion. The federal court must then apply state law to the actual facts. If the federal court does anything less, it abdicates its responsibility.

III. IT IS NOT A FUTILE GESTURE FOR THIS COURT TO INSRUCT THE TENTH CIRCUIT TO DECIDE THIS CASE BASED ON THE ACTUAL FACTS.

Dex argued in its this Petition for Writ of Certiorari that "the Utah Supreme Court should have applied Utah law to the factual scenario set forth in the Certification Order." Petition at 14.

In response, Dex argued that "the final result on remand would be the same." Opposition at 8. Dex's argument was based on the principle that the Tenth Circuit must follow the Utah Supreme Court regarding Utah law, and therefore must inevitably reach the same result.

However, a review of the decision of the Utah Supreme Court shows that Utah law does not require dismissal of this case.

It is true that, as a matter of law, the Utah Supreme Court interpreted the word "source" to be the identity of the business advertised, not the location of the business. App. B-7. Since consumers were not confused as to the identity of the business, there was indeed no violation of subsection 13-11(a-3)(1)(b) of the *Utah Code*.[1]

However, the Utah Supreme Court did not eliminate violations of subsections 13-11(a-3)(1)(d) and (t) in the same way.

---

[1] "A person causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services."

Addressing subsection 13-11(a-3)(1)(d),[2] the Utah court concluded there were no deceptive representations or designations of geographic origin. However, its basis was that Dex "only informs customers that the firm is willing to provide its services to those located in the calling area." App. B-8. (Emphasis added). Clearly, that is not a legal pronouncement. Thus the court's conclusion that there was no violation of this subsection was based on a new fact.

Going on to subsection 13-11(a-3)(1)(t),[3] the Utah Supreme Court ruled (as a matter of law) that subsection (t) only addressed matters of similar magnitude. It then went on to examine whether Dex's actions were of similar magnitude. But the court decided the deceptions were not of similar magnitude because "some may presume that businesses with a local number have an office in the vicinity." App. B-9. (Emphasis added.) The court thus used facts of a magnitude very different from the magnitude of the certified facts that "67% of Dex customers are tricked or misled." App. A-3. (Emphasis added.)

In sum, the Tenth Circuit Court, following Utah law, can and should reach a different result in this case. Following state law does not mean that a federal court must invariably adopt conclusory statements based on facts different from the certified facts.

---

[2] "A person uses deceptive representations or designations of geographic origin in connection with goods or services."

[3] "A person engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."

CONCLUSION

The fact that litigants may give up when a state court rules against them does not warrant the conclusion that only a few state courts are answering certified questions based on facts other than those in the certification orders.

It is not immaterial that a state court answers a certified question based on new facts. Rather than blindly accepting such an answer, a federal court must glean legal pronouncements from the opinion. The federal court must then apply state law to the true facts of the case.

This Court should accept certiorari and tell federal courts what to do when state courts answer certified questions based on different facts. This case should then be remanded to the Tenth Circuit.

DATED this 23rd day of February, 2007.

LYNN P. HEWARD

(Counsel of Record) Attorney for Petitioner